

UNITED STATES TAX COURT
WASHINGTON, DC 20217

LAWRENCE G. GRAEV & LORNA GRAEV,)	
)	
Petitioners,)	
)	
v.)	Docket No. 30638-08.
)	
COMMISSIONER OF INTERNAL REVENUE,)	
)	
Respondent)	

ORDER

Now before the Court, fully briefed by the parties, are two motions: (1) petitioners' motion for partial summary judgment (which asserts that respondent failed to comply with section 6751(b) before asserting the accuracy-related penalty in the notice of deficiency) and (2) respondent's alternative motion for leave to amend his answer to assert the same penalty anew (in the event petitioners' motion is granted). It is

ORDERED that respondent's alternative motion for leave is granted, for the reasons stated in respondent's motion and reply. If the Court grants petitioners' motion for partial summary judgment, then the Court would thereby have determined that the purported penalty determination in the notice of deficiency was not valid, leaving the amended answer as pleading the "initial determination" of the penalty (as to which respondent contends that he complied with section 6751(b) in any event). Respondent is permitted by section 6214(a) to plead in his answer a penalty not validly asserted in the notice of deficiency, and we see nothing in the language or purpose of section 6751(b) to abrogate that opportunity. Moreover, given petitioners' prior awareness of respondent's position that petitioners are liable for the penalty, and given the months that still intervene between now and any trial of this case, we see no possible prejudice to petitioners that would result from allowing the amendment of the answer to plead the penalty. It is further

ORDERED that the Court will take under advisement petitioners' motion for partial summary judgment and expects to resolve that motion only in the event that the issue it presents proves to be outcome-determinative. The situation appears as follows: As to the penalty, respondent will have the burden of production under section 7491(c) in any event. If the Court were to grant petitioners' motion, then respondent would also have the burden of proof under the "new matter" provision of Rule 142(a)(1). On the other hand, if the Court were to deny petitioners' motion, then petitioners would have the burden of proof under the general rule of Rule 142(a)(1). That is, respondent will have the burden of production in any case, and section 6751(b) will affect only which party thereafter has the burden of proof, and that will affect the outcome of the case only if the evidence is in equipoise and neither party wins by the preponderance--a circumstance that seldom happens. It is further

ORDERED that the parties will consult with one another and, no later than October 31, 2014, will file a joint status report advising the Court as to: (1) the parties' estimates of the amount of trial time that will be needed; (2) the parties' joint or several recommendations as to the order of presentation that should be followed at the trial of this case; and (3) the parties' suggestions of at least three weeks within January and February 2015 when both parties would be available to conduct the trial.

(Signed) David Gustafson
Judge

Dated: Washington, D.C.
October 6, 2014